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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT AND SUPPLEMENTAL BRIEF ON REARGUMENT

EUGENE GRESSMAN,
Special Counsel,
U.S. House of Representatives,
Visiting Professor, Fordham University
School of Law, 140 West 62nd Street,
New York, N.Y. 10023.
(212) 841-5242

Of Counsel:
STANLEY M. BRAND,
General Counsel to the Clerk,
U.S. House of Representatives,
Washington, D.C. 20515
(202) 225-7000

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MOTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT

The United States House of Representatives respectfully asks leave of Court to file the attached Supplemental Brief on Reargument.

These consolidated cases were argued on February 22, 1982. On July 2, 1982, the Court ordered that the cases be "restored to the calendar for reargument." 50 U.S.L.W.

3998.27 (U.S. July 2, 1982). The reargument is scheduled for December 7, 1982.

The attached Supplemental Brief is not limited to "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in [the] brief in chief," within the meaning of Rule 35.5. It is therefore necessary to seek leave to file this brief.

The House of Representatives seeks leave to file this attached supplemental brief because these cases involve profound and difficult issues respecting jurisdiction, justiciability, and the constitutional structure of the three branches of the federal government. The fact that the Court deemed it necessary to order reargument seems to indicate that these important problems find no easy answers. The House of Representative believes that the further considerations and arguments contained in the attached brief may be of assistance to the Court in resolving these many-faceted cases.

Some of the additional considerations advanced by the House in the attached brief are derived from the Court's discussion last Term of congressionally created "public rights." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982). Attention is also paid to some of the judicial progeny of the Ninth Circuit's ruling in *Chadha*. Particular references are made to the District of Columbia Circuit's post-*Chadha* rulings in *Consumer Energy Council, et al.* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), now pending before this Court on appeals and petitions for certiorari (Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209); and in *Consumers Union of United States, et al.* v. *Federal Trade Commission, et al.* (D.C. Cir. No. 82-1737, Oct. 22, 1982), appeals from which are destined to be filed in this Court.*

Other Article III repercussions of the *Chadha* ruling are found in several District Court decisions and proceedings, discussed in the attached brief. *Pacific Legal Foundation* v. *Watt*, 529 F.Supp. 982 (D.Mont. 1982); *American Foreign Service Association* v. *McPherson* (S.D.N.Y. Civil Action No. 82 Civ. 5224).

Wherefore, the House requests leave of Court to file the attached Supplemental Brief on Rehearing.

Respectfully submitted,

EUGENE GRESSMAN,
Special Counsel,
U.S. House of Representatives,
Visiting Professor, Fordham University
School of Law, 140 West 62d Street,
New York, N.Y. 10023.
(212) 841-5242

Of Counsel:

STANLEY M. BRAND,
General Counsel to the Clerk,
U.S. House of Representatives,
Washington, D.C. 20515
(202) 225-7000

November 1982.

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*In fact, notices of appeal were filed by the Senate and House of Representatives on November 4, 1982.

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UNITED STATES HOUSE OF REPRESENTATIVES SUPPLEMENTAL BRIEF ON REARGUMENT

The United States House of Representatives submits this Supplemental Brief to emphasize certain additional considerations that merit the Court's attention in these consolidated cases. Some of the considerations advanced

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last Term by the parties also deserve reevaluation in light of the new insights and reflections contained herein.

SUMMARY OF ARGUMENT

At the heart of this case is the essentially negative nature of the House resolution in question, H. Res. 926. It states that "the House of Representatives does *not* approve the granting of permanent residence in the United States" to Jagdish Rai Chadha, an alien who concedes his deportability (emphasis added).

The Ninth Circuit, like the parties below, seems intent on extracting some kind of positive lawmaking out of the negative character of H. Res. 926. The attempt is flawed by confusion and uncertainty. No effective demonstration is made that H. Res. 926 has altered or affected any legal right or interest of Chadha. Nor is it shown that H. Res. 926 operated to change Chadha's legal *status quo,* which at all times has been that of a lawfully deportable alien. Thus the parties and the court below are unable to show that the passage of H. Res. 926 is equivalent to the passage of plenary legislation, which must meet the bicameral and presentment requirements of Article I, Section 7.

On the false premise that there must be some positive lawmaking aspects to H. Res. 926, the Ninth Circuit reaches an absurd constitutional conclusion: Congress is said to lack constitutional power to provide a statutory scheme for saying "no" to requests from individual deportable aliens that they be allowed to remain permanently in the United States. It is said to lack that power because the statutory scheme embodied in Section 244(c)(2) constitutes an unconstitutional interference by Congress with the executive and judicial functions under Section 244. That cannot be.

Such an exercise in constitutional adjudication totally overlooks the kind of vested power that Congress is here exercising. It is the power of Congress to deal with the exclusion of illegal aliens. Over no conceivable subject is the legislative power of Congress more complete than it is over that subject. It is a vast power, grounded in the sov-

ereignty of the United States and partaking of domestic and foreign political affairs. This Court has long recognized that the scope of judicial intervention in such matters is extremely limited. Indeed, congressional decisions on these issues historically have been treated by the Court as "political questions" immune from judicial consideration or response. The congressional decision reached in H. Res. 926 must be considered to be of that nature.

Such sovereign and political considerations make the judgment of the Ninth Circuit in this case especially suspect. Under the guise of granting relief for a perceived constitutional violation by Congress, the court of appeals orders that Chadha's deportation proceedings be cancelled, that his status be adjusted to that of a permanent resident alien, that the Attorney General cease and desist from taking any steps to deport Chadha (which he is obliged to do under Section 244), and that the status alteration be retroactive to 1974, making Chadha immediately eligible to apply for naturalization. This is judicial intrusion into legislative policymaking.

The opinion below also succeeds in misreading the language and import of Section 244 of the Immigration Act. It ignores the obvious fact that the Section 244 scheme relates to processing applications for congressional "acts of grace" or waivers of lawful deportation orders. It also ignores the fact that Section 244 deals with congressionally created "public rights." That means that Congress, in dealing with the "public rights" or entitlements associated with applications by aliens for "acts of grace," can statutorily provide for deciding such matters itself, or delegate authority to decide to executive officers or judicial tribunals. All of which emphasizes how great is the Ninth Circuit's misconception of the authority of Congress to condition its delegation to others.

All these considerations need not be resolved by the Court at this time. It still remains true, as was urged at the argument last Term, that Chadha does not have Arti-

cle III standing to institute this litigation. Nor can such litigation be allowed in federal courts in the absence of truly adverse party litigants. The *Chadha* precedent allowing such suits has already produced a number of unfortunate progeny.

ARGUMENT

1. THE DECISION BELOW REFLECTS A CRITICAL MISUNDERSTANDING OF THE NON-LAWMAKING CHARACTERISTICS OF H. RES. 926

The controlling factor in this case, the factor that dominates all issues, is essentially negative in nature. It involves what Congress did *not* do, rather than what it did do.

The essentially negative nature of the resolution is borne out by the very terms of H. Res. 926, which states that "the House of Representatives does *not* approve the granting of permanent residence in the United States" to the alien Jagdish Rai Chadha. J.S. App. 69a, emphasis added. Consider the legal and practical implications of the use of the word "not" in H. Res. 926:

(1) One House of Congress did *not* approve the granting of permanent residence in the United States to Chadha. That means that Chadha did not acquire the new status of a permanent resident alien.

(2) Because of H. Res. 926, Congress did *not* undertake an "act of grace," *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Only by such a discretionary "act of grace," concurred in by both Houses, could Chadha's deportation proceedings be cancelled and his status changed to that of a permanent resident alien. 8 U.S.C. § 1254(d).

(3) Thus Congress did *not* so act as to alter the legal *status quo* respecting the alien Chadha. This *status quo* at all times has been, and remains, that of a concededly deportable alien. And he is deportable not as a result of the adoption of H. Res. 926, but as a result of having overstayed his student visa in violation of Sections 101(a)(15)(J) and 1251(a)(2) of the Act.

(4) It further follows that, by virtue of H. Res. 926, Congress did *not* enact any kind of what the Ninth Circuit calls "positive law that alters individuals' substantive rights," 634 F2d at 434. Congress has done nothing to affect the positive legal rights or interests of Chadha. He asserts no legal or constitutional rights respecting his deportation order. And any entitlement he may have to a Section 244 "act of grace" from Congress, even if he is eligible on "hardship" grounds, "is manifestly not a matter of right under any circumstances." *Jay* v. *Boyd*, 351 U.S. at 354. Thus the House disapproval of Chadha's plea for an adjustment of his deportable status cannot operate to alter any of his personal rights or to effect a change in his legal *status quo*. Chadha remains a deportable alien. H. Res. 926 accordingly does not qualify as a "positive law" enactment.

The Ninth Circuit, like the parties below, exhibits uncertainty and confusion about the positive lawmaking features of H. Res. 926. The court does say, quite properly, that positive law is that "which alters the substantive legal rights of individuals," 634 F.2d at 435. The court then makes a controversial assumption that the power of Congress under the Necessary and Proper Clause to "make all laws" does not include the power to "alter substantive legal rights of individuals" by doing something less than enacting a plenary statute. That "something less" in this instance is said to be the alteration of individual rights by a "legislative inaction" approval of "a mere executive recommendation"—all done pursuant to the procedures specified in Section 244(c)(2).

There are numerous flaws in that assumption. This case does not involve any of Chadha's "substantive legal rights." And any possible "legislative inaction" approval of the Attorney General's recommendation that Congress give Chadha a discretionary "act of grace" is not an exercise of congressional power under the Necessary and Proper Clause to "make all laws." It is a statutorily au-

thorized involvement by Congress in its uniquely sovereign and political power respecting alien deportation.

But the chief difficulty with the Ninth Circuit's assumption is that, on its own terms, the assumption does not apply to H. Res. 926. That resolution *disapproved* any possible change in Chadha's deportable status. H. Res. 926 has no positive lawmaking characteristics, even under the Ninth Circuit's definition. The court failed to distinguish between negative and affirmative legislative action under Section 244(c)(2). It therefore addressed what it thought was "an insurmountable formal constitutional problem" stemming from "legislative inaction" *approval* of a change in Chadha's legal *status quo.*

The negative legislative judgment rendered by H. Res. 926 presents no insurmountable constitutional problems. In the words of Justice White's separate opinion in *Buckley* v. *Valeo,* 424 U.S. 1, 285 (1976), the power of either House, to disapprove is not the "equivalent to legislation or to an order . . . requiring the concurrence of both Houses. The one-House disapproval device, to repeat, "does not alter the existing law in any fashion, but only preserves the legal *status quo.*" *Atkins* v. *United States,* 556 F.2d 1028, 1963 (Ct. Cls. 1977),[1] *cert. denied* 434 U.S. 1009 (1978).

This curious inability to distinguish between two-House lawmaking and one-House non-lawmaking manifests itself in several other passages in the Ninth Circuit's opinion. Thus there is an ominous reference to "the potential for unfair or discriminatory use of lawmaking [by the disapproval mechanism] directed at named individuals." 634 F.2d at 535. Coupled with the drastic nature of the deportation sanction, says the court, "disapprval as an exercise of legislative power . . . would raise serious

[1] "Therefore, we can say that when a decision not to change the status quo is involved, either house can speak for Congress." Barber, *The Constitution and the Delegation of Congressional Power* 111 (1975). That is equally true when one House votes down, or refuses to consider, a bill introduced by one of its own members.

bill of attainder and equal protection problems." *Id.*, n. 42.

Suffice it to say that these "problems" are both illusory and non-existent in the context of a one-House disapproval that serves to perserve the legal *status quo* of a named individual. Chadha, it bears repeating, is not singled out in H. Res. 926 in order to impose on him the deportation sanction. He is not singled out for any kind of discriminatory treatment, and he does not so claim. Chadha concedes he is deportable under the Act, and H. Res. 926 leaves him precisely in that status. He is singled out in the resolution simply because at least one House of Congress deems it inappropriate to grant him, as an illegal alien, "permanent residence in the United States." Congress, as the House has long maintained, has unquestioned power to deny individual aliens such permanent residence. That proposition the Ninth Circuit does not even mention.

The Ninth Circuit also seeks to convert its inability to distinguish between the lawmaking and the non-lawmaking aspects of Section 244 into "a regime under which any presidential proposal on a given subject would become part of the United States Code if no house of Congress objected within, say, sixty days." 634 F.2d at 435. But the instant case does not involve any kind of two-House non-objection being used to permit an executive proposal or act to become part of "the law." Quite the contrary. There has been no law change in and no addition to the United States Code. And to suggest that one instance of non-lawmaking under Section 244 indicates that Congress has embarked on a process of subverting the whole bicameral legislative process is to make applicable this Court's remark in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940):

> It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes

> timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May,* 194 U.S. 267, 270.

The Congress' power is not controlled by what it "might do," but what it *has* done and the Ninth Circuit's hypothetical posturing can no more serve as a basis for voiding exercise of power over aliens than the positing of hypotheticals about the reckless conduct by President's could serve to limit his powers. *Nixon* v. *Fitzgerald,* 102 S.Ct. 2690 (1982).

Seemingly in an effort to avoid some of the Ninth Circuit's confusion respecting the non-lawmaking nature of H. Res. 926, the Solicitor General's brief in this Court, filed on behalf of the INS, falls into even greater confusion and difficulty. The whole brief is premised on the thought that Section 244(c)(2) is unconstitutional because it authorizes a negative one-House resolution to serve as a kind of "positive law." The very first sentence of the argument portion of the brief (p. 15), makes the astounding assertion that Section 244(c)(2) "authorizes one House of Congress, acting alone, to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws." Section 244(c)(2) says no such thing. When one House disapproves a Section 244 petition for an "act of grace," the Attorney General is required to deport the petitioning alien because the alien's plea for mercy has failed and because he is otherwise deportable under the immigration laws. Certainly that is the way the Attorney General has interpreted and performed his duties under Section 244, at least prior to the *Chadha* litigation.

From the faulty premise that a one-House resolution of disapproval under Section 244(c)(2) "requires" the Attorney General to deport an individual "who otherwise would not be deported," the Solicitor General's brief then attempts a description of this kind of "positive lawmaking." Actually, the Solicitor General presents two ver-

sions, which may be most conveniently compared side by side.

The "Summary of Argument" version, p. 10	The "Argument" version, p. 15
The effect of a resolution passed by one House pursuant to that Section therefore is precisely the same as that of a duly enacted *law* amending the Act to exclude a particular alien from eligibility for relief.	The effect of a resolution passed by one House under that Section is to amend the Act to exclude a particular alien from the relief generally afforded to aliens who are found by the Attorney General, after a hearing, to be eligible for suspension of deportation and permanent resident alien status.

But the Solicitor General offers no clues as to which version of "the law" enacted by H. Res. 926 is the correct one. Does the claimed amendment of the Act relate to excluding Chadha "from eligibility for relief," or does it exclude Chadha "from the relief generally afforded to aliens" found eligible by the Attorney General? The truth is that either version is spurious. Both the temporary "suspension" relief available from the Attorney General and the final "act of grace" relief available from the Congress are given or withheld in large part as discretionary matters. And the fact that Chadha was considered eligible for the temporary relief afforded by the Attorney General has no bearing on whether Congress, in its legislative discretion, desires to confer permanent residence status on an illegal alien.

The attempt to convert a legislative "no" into a legislative "yes" is marked by a not-so-subtle shift in defining the focus of the legislative resolution of disapproval. The shift is from the substantive law of the subject matter of the resolution to the procedures and actions of the officer or agency below. Thus in the instant case, the search for a positive law change focuses not on Chadha's status as a deportable alien or his entitlement to become a perma-

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nent resident but on the supposed change in Chadha's eligibility for the relief "generally afforded" aliens found eligible by the Attorney General. In other words, the positive law change is said to be found in the inability of the Attorney General to give Chadha the kind of relief he generally affords other eligible aliens. That argument is without merit. The inability of the Attorney General to give Chadha relief, or his loss of eligibility, stems from the Section 244 scheme.

The *Chadha* court's faulty efforts to transmute a negative into a legislative "yes" has already been seized upon by the D.C. Circuit in *Consumer Energy Council, et al.* v. *Federal Energy Regulatory Commission,* 673 F.2d 425 (D.C. Cir. 1982), now pending before this Court on appeals and petitions for certiorari (Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209). In that case, the House of Representatives voiced its disapproval, by a resolution, of a proposed Commission regulation respecting natural gas pricing. In holding that such one-House disapproval constituted an attempt to legislate a positive law change in violation of the Presentment Clauses, the court held that the disapproval resolution "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect." 673 F.2d at 465. That is a perfect illustration of the *Chadha*-like search for a positive law change. The focus of the search is the effect on the agency's discretion—which in any event is the product of the statutory scheme—and not the substantive legal effects on the rights or obligations of affected persons.

2. THE DECISION BELOW UNDERMINES THE CONSTITUTIONAL AND SOVEREIGN POWER OF CONGRESS OVER ALIENS, INCLUDING THE POWER TO DENY PERMANENT RESIDENT STATUS TO DEPORTABLE ALIENS

The Ninth Circuit reaches an absurd constitutional result. It literally holds that Congress lacks constitutional power to provide a statutory scheme for saying "no" to requests from individual deportable aliens that they be

allowed to remain permanently in the United States. That power to say "no" must either be lodged in the Executive and the Judiciary or be translated into new plenary legislation, in the nature of private bills.

That result is constitutionally unwarranted. Not one word or provision in the Constitution dictates or even suggests such a limitation on the power of Congress respecting the ever-present problems of immigration and deportation. On the contrary, as *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819) made clear, ours is a Constitution designed "to be adapted to the various *crises* of human affairs," a Constitution that expands rather than contracts "the power of Congress to adopt any [statutory means] which might be appropriate, and which were conducive to the end" of executing "those great powers on which the welfare of a nation essentially depends." And it is in that spirit that Section 244(c)(2) is to be juxtaposed with one of the greatest powers of Congress, the vested power over aliens.

A. THE SOVEREIGN FACTOR

It bears repetition that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission and exclusion of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909); *accord*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). This congressional power is uniquely plenary, truly extraordinary. It not only partakes of the vested Article I powers over naturalization and foreign commerce but exists "as inherently inseparable from the conception of nationality . . . in the laws of nations." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936).

As stated in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893), the power to exclude or expel aliens is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." The power has also been described as "an incident of sovereignty belonging to the govern-

ment of the United States, as a part of those sovereign powers delegated by the Constitution." *The Chinese Exclusion Case,* 130 U.S. 581, 609 (1889).[2] And this great sovereign power is constitutionally vested in the Congress of the United States. Indeed, that the formulation of policies and procedures for exercising such sovereign power is entrusted exclusively to the Congress is "about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press,* 347 U.S. 522, 531 (1954).

Moreover, this sovereign power over aliens necessarily includes the power to admit or exclude either classes of aliens or individual aliens. *See Knauff* v. *Shaughnessy,* 338 U.S. 537, 543 (1950), acknowledging the power "to exclude a given alien" as being a fundamental act of sovereignty. This power to exclude particular aliens in turn includes power "to determine what noncitizens shall be permitted to remain within our borders." *Carlson* v. *Landon,* 342 U.S. 524, 534 (1952). Thus when a deportable alien applies for permission to remain within our borders as a permanent alien resident, he is asking Congress to exercise one of its most sovereign functions.

The procedure by which Congress responds to such a request is determinable solely by Congress. Whatever entitlement or right the alien may be said to have with respect to securing the requested status change, it is a congressionally created "public right" that is not inherently judicial in nature. And when such public rights are involved, the constitutional rule announced in *Ex parte Bakelite Corp.,* 285 U.S. 438, 451 (1929),[3] becomes applicable:

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[2] See also *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 659 (1892), describing the legislative power over aliens as one "inherent in sovereignty." In *Carlson* v. *Landon,* 342 U.S. 524, 534 (1952), the Court observed that the plenary power of Congress to expel aliens stems from "the sovereign right to determine what noncitizens shall be permitted to remain within our borders." And see *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953).

[3] *Ex parte Bakelite Corp.,* 279 U.S. at 451, n. 8, cites the landmark decision in *Fong Yue Ting,* 149 U.S. at 714–715, sustaining the power

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> The mode of determining matters of this class is completely within congressional control. *Congress may reserve to itself the power to decide,* may delegate that power to executive officers, or may commit it to judicial tribunals. (Emphasis added).

See also *Crowell* v. *Benson,* 285 U.S. 22, 50-51 (1932); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 102 S.Ct. 2858, 2869-2871 (1982).

The inescapable conclusion is that the plenary sovereign authority of Congress over aliens provides powerful constitutional support for the congressional procedures embodied in Section 244(c)(2). Congress has there provided for its own involvement in the sovereign decision whether a particular deportable alien should be granted the privilege of staying permanently within the United States. At this late stage of constitutional development, "it would be an extraordinary departure from the usual course of the human mind, *McCulloch* v. *Maryland,* 4 Wheat. at 419, to deny the sovereign footings of the Section 244(c)(2) procedures.

The Ninth Circuit simply avoids any mention of the sovereign nature of the congressional power over aliens. It recognizes the existence of such power, but only to the extent that it reflects congressional power over foreign commerce and naturalization under Art. I, § 8, cl. 4. *See* 634 F.2d at 433. But the court misses the significance of even these two constitutional footings of Section 244(c)(2). Having quoted the foreign commerce and naturalization provisions of Article I, Section 8, the Ninth Circuit proceeds to ignore them as tools in the process of constitutional adjudication. The power of Congress over aliens, to

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of Congress to expel aliens, as an instance of the kind of powers which can be executed by Congress itself. Likewise, *Crowell* v. *Benson,* 285 U.S. at 51, n. 13, cites in support of this same proposition such immigration cases as *United States* v. *Ju Toy,* 198 U.S. 253, 263 (1905). More recently, the plurality opinion in the *Northern Pipeline* case, 102 S.Ct. at 2870, n. 22, quotes anew the *Crowell* v. *Benson* catalogue of "public rights"—including immigration matters—that Congress can either resolve itself, delegate to executive officers, or commit to courts.

the extent the court acknowledges its existence, is said not to justify the use of the one-House disapproval device "to revise particular administrative dispositions" or to enact "positive law that alters individuals' substantive rights." 643 F.2d at 434.

But the court's concentration on perceived misuses of the plenary power of Congress over aliens violates the court's own dictum that "the legitimacy of a particular exercise of this power cannot be decided in the abstract." 643 F.2d at 434. Indeed it cannot. The exercise of a congressional power must first be considered in light of the power itself. *McCulloch* v. *Maryland* made it crystal clear that the means employed by Congress to execute a vested power cannot be assessed in isolation; the means must be rationally related to some constitutional end. In *McCulloch*'s words, the means must relate to "the accomplishment of objects . . . entrusted to the government" and must be "really calculated to effect any of the objects entrusted to the government." 4 Wheat. at 423.

Thus, if Section 244(c)(2) is "really calculated" to effect this sovereign power over aliens, involving as it does matters that "may implicate our relations with foreign powers," *Matthews* v. *Diaz,* 426 U.S. 67, 81 (1967), then we have a different and highly significant factor to consider in assessing the constitutionality of Section 244(c)(2). Only if some other provision of the Constitution—be it the Presentment Clauses or the general separation of powers doctrine—can be said "imperiously," *McCulloch,* 4 Wheat. at 408, to withhold from Congress the power to implement this sovereign power by use of the one-House disapproval device, can any part of Section 344(c)(2) be rendered unconstitutional.

Such factoring in of the sovereign nature of this power, when figuring the ultimate constitutional equation, is why this Court has consistently said that, when exercising this kind of sovereign power over aliens, "Congress regularly makes rules that would be [constitutionally] unacceptable if applied to citizens." *Matthews* v. *Diaz,* 426

U.S. at 80, *quoted with approval* in *Fiallo* v. *Bell*, 430 U.S. at 792. And that is why this Court has consistently tested various alien-control statutes by balancing the sovereign power over aliens against other constitutional provisions that aliens have relied upon, such as the Fifth Amendment. *See Fong Yue Ting*, 149 U.S. at 712-713. It thus may be decisive that, given the sovereign objectives involved, the one-House disapproval device may be constitutionally justified "by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

The Ninth Circuit asks and answers the wrong constitutional questions. The constitutional problem is not whether the legislative review device, viewed generically and in isolation, is consistent with the Presentment Clauses or the general separation of powers doctrine. The problem, rather, is whether the one-House disapproval device, when used in aid of executing the exclusive and sovereign legislative power to determine which deportable aliens should be given permanent residence in the United States, is "imperiously" proscribed by the Presentment Clauses or the general separation theory. The Ninth Circuit's opinion provides no answers to that critical question.

Unfortunately, the opinion below, by disregarding the sovereign factor in this case, may well have deprived Congress "of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances," *McCulloch*, 4 Wheat. at 415, in dealing with the volatile problems of illegal and deportable aliens.

More than that, the court in effect reduces the Necessary and Proper Clause to what Governor Randolph called "tautology." III Elliot's Debates 464. It deprecates and dilutes the ability to exercise a sovereign power deemed essential to the safety and welfare of the country, *Fong Yue Ting*, 149 U.S. at 711, save through the enactment of new plenary legislation. And by effectively trans-

ferring the exercise of this sovereign legislative power to the Executive and the Judiciary, the court creates an unfortunate legacy. By terms of the opinion below, Congress has lost control not only of the exercise of its own uniquely sovereign power but also of its capacity to achieve the inter-Branch coordination so essential to the working of modern complex government.

B. THE POLITICAL QUESTION FACTOR

After a glancing acknowledgement that the Naturalization Clause, in conjunction with the Necessary and Proper Clause, "gives Congress considerable power over aliens," 634 F.2d at 418, the Ninth Circuit gives short shrift to the political question factor in this case. The court concludes that the political question doctrine is not implicated because Chadha's claim rests on the separation of powers doctrine, which is not textually committed to any one branch. The court adds that it "would stand the political question doctrine on its head" if the Judiciary were required to defer to another branch's determination that its acts do not violate the separation doctrine. 643 F.2d at 419.

That analysis is unacceptable and counterproductive. It turns upside down a political question strawman. No one argues that the political question in this case is to be found in the separation doctrine. Where it is found is in the political determination in H. Res. 926 that the House of Representatives disapproves granting Chadha "permanent residence in the United States." And that constitutional basis for Congress or either House making that kind of a political determination is to be found in the vast sovereign power of Congress over aliens, in conjunction with the Naturalization Clause and the Necessary and Proper Clause. The separation doctrine is relevant, if at all, only to the extent that it can be said to restrict or prohibit congressional authority to make such a political determination.

Perhaps the most ironic and troublesome aspect of the decision below is the Ninth Circuit's own determination

that Chadha should be allowed permanent residence in the United States. Under the guise of providing relief for the perceived violation of the separation doctrine, the court (1) decrees finality to the Attorney General's decision to "stay" deportation (634 F.2d at 436), (2) deems Chadha's lawful deportation proceedings cancelled (at 436), (3) orders the Attorney General to "cease and desist from taking any steps to deport this alien" based upon H. Res. 926 (at 436), (4) refuses to "relegate him to the relief afforded by the immediate relative petition" (at 417, n. 6), and (5) awards Chadha permanent resident status, effective retroactively to 1974, so that he becomes immediately eligible to apply for naturalization (at 417, n. 6). There is no statutory or legal authorization cited in support of such judicial determinations of political questions. As developed below, such judicial orders that effectively and unabashedly grant permanent resident status to Chadha are of the essence of a political question determination. The Ninth Circuit itself has violated the separation of powers doctrine, for the determination of political questions is simply beyond the Article III competence of the Judiciary.

That the grant of permanent resident status to a lawfully deportable alien is a determination of a political question is a proposition long established by this Court's precedents. The highly sovereign component of the congressional power over individual aliens has always been recognized as giving a strong political coloration to the exercise of that power. Thus in *Fong Yue Ting*, 149 U.S. at 712–713, the Court spoke of such exercises as involving "political questions," the answering of which is vested by the Constitution in "the political departments of the government." For that reason, the Court added (at 712–713),

> . . . it behooves the court to be careful that it does not undertake to pass upon [such] political questions . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

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As if to make the point doubly clear, the Court repeated (at 731) that the question "whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Faithful to the *Fong Yue Ting* precedent, the Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953). *See Heikkila* v. *Barber,* 345 U.S. 229, 233 (1953), referring to "the purely political nature of the legislative power over aliens"; *Landon* v. *Plasencia,* 51 U.S.L.W. 4001, 4005 (Nov. 15, 1982).

The political nature of the exercise of this sovereign power, as the Court observed in *Matthews* v. *Diaz,* 426 U.S. 67, 81 (1976), flows from the fact that legislative decisions in this area "may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." The *Matthews* opinion, citing the definitive description of political questions contained in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), significantly observed that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization." 426 U.S. at 81-82.[4]

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[4] Decisions as to whether to deport an illegal alien or to allow the alien to remain permanently in the United States are closely akin to decisions as to foreign policy. The latter type decisions are considered

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The law is accordingly clear that the legislative power over aliens, including the power to determine which deportable aliens should be granted permanent resident status, "is of a political character and therefore subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 101, n. 21 (1976), citing the *Fong Yue Ting* ruling.[5] And legislative determinations in this sovereign area are deemed political determinations, functionally falling within the *Baker* v. *Carr* delineation of "political questions."

To summarize, the power to exclude or expel aliens, or to allow them to become permanent residents of this country, "being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting,* 149 U.S. at 713. It is "a sovereign power necessary to the safety of the country" and thus "is political and is vested in the political departments of the Government." *Mahler* v. *Eby,* 264 U.S. 32, 39–40 (1924). In short, any decision rendered on such a sovereign and political matter must be deemed to involve a "political question," and thus outside the realm of judicial competence.

The political nature of the legislative determination that at least one House "does not approve the granting of permanent residence in the United States" to Jagdish Rai Chadha assumes utmost significance in this case. It affects the problem whether Chadha has any standing to challenge the separation of powers implications of a polit-

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"political, not judicial," being "wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U.S. 103, 111 (1948). Such decisions are deemed "delicate, complex, and involve large amounts of prophecy . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*

[5] See also the statement in *Fiallo* v. *Bell,* 430 U.S. at 792, that "it is important to underscore the limited scope of judicial inquiry into immigration legislation."

ical judgment rendered by Congress on a discretionary matter so textually and totally committed by the Constitution to the Congress. It casts grave doubts on the constitutional capacity of the Ninth Circuit, or any court, to transfer to the Executive or the Judiciary any authority to render a final decision on Chadha's application to remain in the United States. And it raises equally grave constitutional problems about the capacity of the Ninth Circuit, under the guise of providing relief for a perceived constitutional flaw in the legislative rendition of a political decision, to make that political judgment itself.

The bottom point is that the Ninth Circuit's judgment does change Chadha's legal status, from that of a deportable alien to that of a permanent resident alien eligible for naturalization. The Ninth Circuit has substituted its judgment that Chadha should assume that new status for the political judgment of Congress that he should not be allowed to attain permanent residence in the United States. To make such a substituted judgment is to engage in a legislative act, a political act, an act that is not "susceptible of judicial determination," *Fong Yue Ting*, 149 U.S. at 715, particularly in the absence of statutory authorization. Pertinent here is the sentiment expressed in *McCray* v. *United States*, 195 U.S. 27, 61 (1904): "The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties."

Such interference with the performance of the political and legislative duties of the Congress will be "productive of nothing but mischief" and may well throw Section 244 of the Immigration Act, and the whole subject of discretionary cancellation of lawful deportation orders, "into the greatest confusion and disorder." *Cf. Decatur* v. *Paulding*, 14 Pet. 497, 516 (1840). Are deportable aliens like Chadha to have a "legal right" to obtain final waivers from the Attorney General, given proof of eligibility? Or must they now secure a court order approving their application for a change in their deportable status? Is the

Attorney General duty bound to follow the Ninth Circuit's legislative rewriting of Section 244 and issue orders "finally" cancelling the deportation proceedings of those aliens he finds eligible for "hardship" waivers? Who is to review and correct the Attorney General's possible abuse and disobedience of statutory standards in granting such final relief? Who is the aggrieved party in that situation, capable of invoking the corrective powers of the courts? And where is the jurisdictional grant that will permit courts to perform that function?

Much the same comments and questions can be raised about the "remedial" actions of the District of Columbia Circuit in two recent post-*Chadha* cases. That court, having found that the legislative disapproval device violates the positive lawmaking procedures of Article I, Section 7, proceeds itself to legislate into existence two disapproved agency regulations. In the *Consumer Energy Council* case, 673 F.2d at 479, the court orders that the Energy Commission's proposed regulation, disapproved by the House, "therefore shall take effect," subject only to possible reconsideration by the Commission. And in *Consumers Union of United States* v. *Federal Trade Commission* (D.C. Cir. No. 82-1737, Oct. 22, 1982), having answered certified questions by holding that a two-House concurrent resolution disapproval device is unconstitutional, the court proclaimed that its decision "will clear the way for the rule to become effective," presumably by action of the district court on remand.[6]

The *Chadha* decision thus seems to have spawned a rash of judicial lawmaking in its most obnoxious form. On the *Chadha* assumption that positive law changes are truly legislative in nature, the changes in Chadha's deportable status decreed by the Ninth Circuit collide directly with the separation of powers concept "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). It

[6] Slip opinion, p. 5 at n. 9.

matters not that the court deems it necessary to make law in order to provide a remedy for the perceived violation of the Constitution. Courts simply cannot legislate new positive law by "fashion[ing] a new rule or . . . provid[ing] a new remedy which Congress has decided not to adopt." *Id.*, at 97.

In all three instances, the courts have made a highly legislative determination in providing relief. In *Chadha*, the court made the legislative determination that an illegal alien shoud be allowed to remain permanently within the United States. In the *Consumer Energy* and *Consumers Union* cases, the court made the legislative determination that a proposed administrative regulation, that Congress has disapproved, must become effective as a matter of law. All these legislative remedies are being provided by the courts despite the absence of any statutory authority for so doing. And in each instance the choice being made by the courts, as in *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980),

> . . . is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Accord, Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646–647 (1981); *United States* v. *Topco Associates*, 405 U.S. 596, 611–612 (1972).

3. THE DECISION BELOW UNDERMINES THE "NECESSARY AND PROPER" POWER OF CONGRESS TO DEVISE PROCEDURES TO APPROVE OR DISAPPROVE "ACTS OF GRACE" SOUGHT BY DEPORTABLE ALIENS

The Ninth Circuit's opinion misreads the language and the purport of Section 244. It exhibits indifference to the

Section 244 scheme for dealing with applications for congressional "acts of grace," preferring to consider Section 244 as a scheme either "to revise particular administrative dispositions" or to enact "positive law that alters individuals' substantive rights." 634 F.2d at 434. As a result, the court of appeals assesses the constitutionality of Section 244(c)(2) in a false statutory and constitutional setting.

A. THE "ACT OF GRACE" CONCEPT

It bears reiteration that a deportable alien's application under Section 244 is directed toward securing a discretionary "act of grace" from the Congress. An alien found otherwise eligible literally seeks two "acts of grace," the first a temporary one from the Attorney General and the other a permanent one from the Congress. The Attorney General's "act of grace" is in the form of a "suspension of deportation," good only until Congress has acted pursuant to Section 244(c)(2).[7]

Jay v. *Boyd*, 351 U.S. 345, 354 (1956), determined that the petitioning alien, who must be subject to a lawful order of deportation, has at most a statutory "right to a discretionary determination [by the Attorney General] on an application for suspension." But, said the Court, a grant of such an application for temporary suspension

> . . . is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U.S. 211, 213.

The "act of grace" label applies equally to the second stage of the Section 244 proceeding, the consideration by Congress of the application for status adjustment. At that final point as well, the deportable alien cannot demand a

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[7] "If the Attorney General approves the application he must refer it to Congress, which has the final word." 2C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, § 7.9a, pp. 7–83 (1977).

favorable "act of grace" from Congress as "a matter of right."

The "act of grace" concept embodied in the whole of Section 244 explains why, when one House disapproves the grant of permanent resident status to the alien, no substantive or procedural right of the alien is impacted. That is also why a one-House disapproval resolution does not create any kind of a positive law change. No one can dispute Justice Jackson's dissenting observation in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 269 (1964), that a Section 244 applicant has no legal right "by virtue of constitution, statute or common law to have a lawful order of deportation suspended" by the Attorney General. By the same token, the applicant has no legal right to have a lawful order of deportation cancelled, or his staus adjusted, by a discretionary "act of grace" of Congress. Nor does the alien have any legal right not to have one House disapprove the grant of such relief.

B. THE "PUBLIC RIGHTS" CONCEPT

Another strand in the Section 244 fabric is the "public rights" doctrine, which played so prominent a role in the Court's decision last Term in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2869–2871 (1982). Application of the doctrine in this case serves to dismantle the Ninth Circuit's major thesis that Congress, in Section 244(c)(2), has somehow disrupted "an essential function of the judicial office," the function of correcting executive misapplication of Section 244, "especially the eligibility criteria." 634 F.2d at 429.[8]

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[8] The Ninth Circuit does not explain how the courts can presently correct abuses of discretion or misapplications of the eligibility criteria in the course of discretionary *grants* of temporary relief by the Attorney General. Neither the Attorney General nor the non-aggrieved alien would appeal such a grant. Moreover, the courts have not been given jurisdiction by Congress to review such grants. Only denials are appealable or reviewable. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968); *Jay* v. *Boyd*, 351 U.S. 345 (1956).

The "public rights" doctrine is traceable to *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855). The Court there held that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Prominent among such congressionally created "public rights" are those involving aliens who seek some form of relief from a threatened deportation or expulsion. Witness *Fong Yue Ting*, 149 U.S. at 715, which relied on *Murray's Lessee* in holding that Congress may commit the decision of deportation matters to the determination of executive officers, finally or only in the first instance. But, said the Court (at 714), there need only be

> . . . such opportunity for judicial review of their [the executive officers'] action as Congress may see fit to authorize or permit.

Thus there can be no vested constitutional function of the Judiciary to review and correct executive misapplications of congressionally created "public rights." The need for, or the existence and extent of, judicial involvement in such matters is solely for Congress to determine, in exercise of its discretion. See *Fong Yue Ting*, 149 U.S. at 712-713, using the *McCulloch* v. *Maryland* analysis of the Necessary and Proper Clause in explaining how Congress can either include or exclude courts from involvement in deportation matters.

Closely related to the "public rights" doctrine is the previously discussed principle of *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). The Court there announced that, in the "necessary and proper" distribution of the power to decide "public rights" matters, Congress "may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." And so in Section 244, Congress has chosen (1) to delegate to the Attorney General discretionary power to grant

temporary "suspensions of deportation," and to report such grants to the Congress, and (2) to "reserve to itself the power to decide" the sovereign and political issue whether a given deportable alien should be allowed to reside permanently in the United States. Congress could have delegated that final authority to executive officers or to the courts, but chose not to do so.[9]

Congress has in effect reserved to itself the "necessary and proper" power to correct executive abuses and misapplications of a plenary statute involving congressionally created discretion to allow a deportable alien to stay on our shores. The fact that Congress chose not to involve the judiciary in reviewing the Attorney General's grants of such discretionary relief does not mean that Congress has interfered with any constitutional or statutory function of the Judiciary. Courts have only those corrective powers, in the context of "public rights," that Congress sees fit to delegate to them.

The Ninth Circuit exceeded all precedent in asserting that it has a "duty" under Section 244 "to determine, at the conclusion of administrative proceedings [that resulted in the grant of temporary relief to Chadha], whether the Executive Branch has correctly applied the statute that establishes its authority." 634 F.2d at 430.

One direct answer to that erroneous assertion of "duty" is found in *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948). The Court there held that certain orders of the Civil Aeronautics Board that were subject to Presidential approval or disapproval could not be reviewed by the courts, for "until the President acts there is no final administrative determination to review." 333 U.S. at 112. And once the President has approved, the Board's recommended order escapes judicial review be-

[9] Chief Justice Marshall observed that "the maker of the law may commit something to the discretion of the other departments," and that Congress "may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Wayman* v. *Southard*, 10 Wheat. 1, 43, 46 (1825).

cause its vitality is then derived "from the exercise of unreviewable Presidential discretion" in a foreign policy matter. 333 U.S. at 113.

There is a remarkable similarity between the situation in the instant case and that in *Waterman*. Here, the Attorney General's grant of temporary relief is unreviewable because, *inter alia*, "there is no final administrative determination to review," even assuming an aggrieved party capable of seeking review. And since the Congress interposes on that temporary relief order a totally new and independent determination of its own, the Attorney General's order escapes judicial review because its vitality is then derived "from the exercise of unreviewable [Congressional] discretion" in a sovereign, political matter.

In the circumstances of this case, the "duty" referred to by the Ninth Circuit, the "duty" to review the Attorney General's grant of temporary relief which has only the force of a recommendation to Congress, would be, to paraphrase *Waterman*, 333 U.S. at 113,

> . . . to render an advisory opinion in its most obnoxious form—advice that the [Congress] has not asked, tendered at the demand of a private litigant, on a subject concededly within the [Congress'] exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive.

C. THE DELEGATION CONCEPT

It should now be evident that Section 244 is a "necessary and proper" law by which Congress has delegated certain functions to the Attorney General in processing applications for deportation waivers, or "acts of grace." Some of those delegated functions are final in nature, such as the function of denying applications by aliens who do not meet the eligibility criteria or do not otherwise satisfy the Attorney General's discretionary concerns. Others are limited and conditional in nature, such as the power to grant temporary suspensions of deporta-

tion pending final action by the Congress itself pursuant to Section 244(c)(2).

As we have seen, Congress can delegate to, or withhold from, the other branches such congressionally created functions as it deems "necessary and proper." Any delegated function thus exercisable by the Executive or the Judiciary "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). This congressional power of delegation has implications that render dubious much of what the Ninth Circuit says about the Section 244(c)(2) interference with executive functions.

Since the power delegated to the Attorney General, in terms of the grant of Section 244 relief, is limited to granting temporary suspensions of deportation, subject to further action by Congress, the Attorney General is duty bound to respect that limitation. See the Article II, Section 3, obligation of the Executive to "take Care that the Laws be *faithfully* executed" [emphasis added]. Simply because Congress has not delegated to the Attorney General the power to grant final relief to such aliens, having reserved that power to itself, does not create what the Ninth Circuit calls legislative "trespasses upon central functions of the Executive." 634 F.2d at 432. What are involved are delegated functions of the Executive, perhaps softened by a "quasi," that find their source in Section 244 of the Immigration Act. They are not traceable to Article II.

The Executive has no vested constitutional power to deal with deportable aliens. And it cannot be that the "central functions of the Executive" demand that the Executive Branch be given the sovereign and political function of finally determining which deportable aliens should be granted permanent residence. Such a transfer of functions from the Congress to the President is antithetical to the Constitution, and to the Necessary and

Proper Clause and the sovereign and political power of Congress over aliens.

Nor can it be properly said that, by reserving this final "act of grace" function to itself, Congress is performing an executive function, or interfering with the administration of Section 244. How can Congress interfere with a function that has never been delegated to the Executive?

Perhaps the "central functions of the Executive" mentioned by the Ninth Circuit are those functions "considered implicit in the nature of the President's office." *Nixon* v. *Fitzgerald,* 102 S.Ct. 2690, 2701 (1982). If so, suffice it to say that the "act of grace" function embodied in Section 244(c)(2) is not of that implicit executive nature.

4. THERE IS A FATAL ABSENCE OF (A) ARTICLE III STANDING TO INITIATE THIS CONSTITUTIONAL CHALLENGE, AND (B) ADVERSENESS BETWEEN THE PARTIES BELOW ON CONSTITUTIONAL ISSUES

The negative characteristic of H. Res. 926 also underscores the standing and adverse party defects in this case. Indeed, "the preservation of these [Art. III] limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important. . . ." *Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59, 96 (1978) (Rehnquist, J, concurring in the judgment).

A. CHADHA'S LACK OF STANDING

The Ninth Circuit makes a futile effort to fit the square pegs of Chadha's legal position into the round holes of the Article III standing doctrine. As most recently summarized in *Valley Forge Christian College* v. *Americans United,* 102 S.Ct. 752, 758 (1982), that doctrine provides that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979),

and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

The opinion below bears witness to the high degree of factual and statutory manipulation needed to find the existence of Article III standing in this case.

(1) *The "actual or threatened injury."* The Ninth Circuit states "that Chadha has indeed suffered injury in fact: the Attorney General will deport him should his challenge fail." 634 F.2d at 417. The injury, in other words, is said to be the deportation that Chadha will suffer at the hands of the Attorney General should the challenge to Section 244(c)(2) fail.

Deportation can of course be an injury, for standing purposes, when an alien challenges some provision of law that creates deportability. But Chadha makes no such challenge. He concedes the legality of his deportation order. He asserts no individual constitutional right to escape deportation or to become a permanent resident of the United States. He makes no constitutional objection to the Attorney General's intent or threat to deport should the challenge to Section 244(c)(2) fail.[10] To put it mildly, deportation as an Article III injury has evaporated from this litigation.

If deportation be not the injury, where does the search for "actual or threatened injury" next lead us? If there is an injury to be found, this Court has said, it must come from a "showing that the feature of the act complained of operates to deprive him of some constitutional right." *Aikens* v. *Kingsbury*, 247 U.S. 484, 489 (1918). And so the

[10] The Attorney General's role in executing lawful deportation orders is "a ministerial act which the law enjoins ona particular officer for a particular purpose," *Marbury* v. *Madison*, 1 Cranch 137, 158 (1803). In *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923), the Court stated that Article III standing cannot be extracted from the fact "that officials of the executive branch of the government are executing and will execute an act of Congress asserted to be unconstitutional."

inquiry must be whether Chadha shows that Section 244(c)(2), the only feature of the Immigration Act that he challenges, so operates as to deprive him of a constitutional right. No such showing is made or can be made.

Section 244(c)(2), we have seen, does no more than establish congressional procedures for saying "yes" or "no" to deportable aliens who seek congressional "acts of grace," excusing them from compliance with lawful deportation orders. The grant of such requested relief "is manifestly not a matter of right under any circumstances," *Jay* v. *Boyd*, 351 U.S. at 354. From which it follows that the denial of a requested "act of grace," illustrated by the adoption of H. Res. 926, does not affect or deny any kind of legal right, constitutional or otherwise, that Chadha might assert. To conclude otherwise would be to impose some kind of a constitutional duty on Congress to grant relief to all eligible deportable aliens. That proposition is intolerable.

Section 244(c)(2), in other words, is confined to matters of legislative procedures; it does not deal with or affect any individual rights. That means that Chadha does not and cannot meet that portion of the "injury" concept that requires a showing by the complaining party "that he is within the class of persons who will be concretely affected," *Blum* v. *Yaretsky*, 102 S.Ct. 2777, 2783 (1982), by the challenged statutory provision. As this Court has so often said, one who would strike down a statute as violative of the Constitution "must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 544–545 (1914); *and see Hatch* v. *Reardon*, 204 U.S. 152, 160 (1907); *Smiley* v. *Kansas*, 196 U.S. 447, 457 (1905); *Southern Railway Co.* v. *King*, 217 U.S. 524, 534 (1910); *Heald* v. *District of Columbia*, 259 U.S. 114, 123 (1922); *Red River Valley Bank* v. *Craig*, 181

U.S. 548, 558 (1901); *Data Processing Service* v. *Camp*, 397 U.S. 150, 153 (1969).

If further evidence is needed of the fact that Chadha is not within the class of persons concretely affected by Section 244(c)(2), it is found in the nature of Chadha's constitutional challenge. He attacks the statute *solely* in terms of the inter-Branch concerns with the general separation of powers doctrine and with the power of Congress to enact legislation without any presentment to, and involvement by, the Executive. The real class of those affected by the operation of Section 244(c)(2) would appear to be the Executive and the Judiciary, and not any individual citizen or alien. Chadha is left in the position of a plaintiff who has no rights of his own to protect, *see Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1881), and is thus forced to assert and volunteer the interests and rights of third parties who are fully capable of protecting their own concerns. *See Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953).

In short, Chadha has suffered no Article III "injury" by reason of the passage of H. Res. 926. Section 244(c)(2) has been applied in such a negative manner as to leave Chadha's legal status as a deportable alien completely unaltered. That he is disappointed in the failure of Congress to confer an "act of grace" upon him is understandable. Such disappointment, however, is but a psychological consequence of the negative operation of Section 244(c)(2). And a psychological consequence, as this Court recently made clear in *Valley Forge*, 102 S.Ct. at 765, "is not an injury sufficient to confer standing under Art. III."

Even when we focus on Chadha's disappointment in the failure of Congress to approve a permanent continuance of the suspension of deportation ordered by the Attorney General, there is no Article III "injury" to be found. *The Chinese Exclusion Case*, 130 U.S. 581, 620 (1889), teaches that there is no constitutional right to "a continued suspension of the exercise of a governmental power [to deport]." If rights cannot be crafted from "expectations of

benefits from the continuance of existing legislation," *id.*, even less can rights be generated out of the loss of expectations of benefits from proposed legal changes never enacted. Chadha thus has no injury stemming from his dashed hopes that Congress would adopt a Section 244 "act of grace."

(2) *Injury that results from, or is fairly traceable to, the challenged "putatively illegal conduct of the defendant."* The Ninth Circuit's treatment of this second prong of the Article III standing doctrine consists of the erroneous statement that "Chadha can directly trace his deportation to the operation of section 244(c)(2)." 634 F.2d at 417.

Deportation, we have seen, is not the relevant injury in this case. Even if it were, Chadha's deportation is not directly traceable to the operation of Section 244(c)(2). Rather, it is traceable to the fact that Chadha remained in the United States for a longer time than permitted by the student visa provisions of Section 101(a)(15)(J). Chadha admits that fact and thus admits that he is deportable.

The major fault in the court's handling of the second prong is the failure to insist that there be a causal nexus between the injury and "the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979). It is not enough to trace a link between the injury and what the court describes as "the operation of section 244(c)(2)." Such operation, if it is to serve as the cause of the plaintiff's injury, cannot be viewed in isolation. The operation, in other words, must be an integral part of the conduct of the defendant, the other party to the litigation. That is why this Court's opinions on standing are replete with such statements as tracing the injury "to the challenged action of the defendant," *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 41 (1976), or showing that the injury is "a result of the putatively illegal conduct of the defendant," *Gladstone, supra,* at 99. Were it otherwise, the causation factor would be converted into a search for an offending statute,

rather than an offending party defendant. Put differently, the defendant must be a proper party to defend the statutory provision when the provision is challenged by an injured plaintiff.

The causation prong of the standing doctrine is lacking in this case. The Immigration and Naturalization Service, an agent of the Attorney General, is the sole party defendant (or respondent in the proceeding below). But neither the INS nor the Attorney General is assigned any functions in the operation of Section 244(c)(2), the provision Chadha challenges. Since Chadha is not challenging any deportation provisions, it is irrelevant that the INS and the Attorney General are charged with executing such provisions. What is critical is the fact that the two Houses of Congress, acting separately or together, perform all actions and functions under Section 244(c)(2). But they were not named as parties defendant or respondent in the review proceedings before the Ninth Circuit. The two Houses appeared there only as *amici.*

The causation requirement received its final *coup de grace* in this case when the INS, as the sole party respondent, determined not to defend the constitutionality of Section 244(c)(2). In reality, the INS joined forces with Chadha in attacking "the putatively illegal conduct" of the Congress, or at least the House of Representatives, in the operation of Section 244(c)(2). The case, as instituted in the Ninth Circuit, thus found itself without an adverse party defendant, a party whose challenged conduct could be said to have injured the plaintiff.

On the causation factor alone, this case is an Article III nightmare.

(3) *Redress of the claimed injury by exercise of the court's remedial powers.* The Ninth Circuit states that the third prong of the standing doctrine has been satisfied, the prong that requires a showing that "the exercise of the Court's remedial powers would redress the claimed injuries" or that "the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co.* v.

Carolina Environmental Study Group, 438 U.S. 59, 74, 79 (1978). And how has this requirement been satisfied here? Very simple, says the court, 634 F.2d at 417–418:

> Thus, if section 244(c)(2) is invalidated, the original suspension under section 244(a) will be reinstated and Chadha's status adjustment will become permanent.

This is an analytically unsound position. As demonstrated in the House brief in chief (pp. 28–33), the Section 244 scheme is tightly integrated, particularly with respect to the *grant* of permanent relief to the deportable alien. Unless Congress approves the grant of permanent relief, pursuant to the procedures set forth in Section 244(c)(2), there is no statutory way by which "the original suspension under section 244(a) will [or can] be reinstated and Chadha's status adjustment will [or can] become permanent." Congress has reserved to itself, in Section 244(c)(2), the final sovereign and political power to determine which deportable aliens shall have their status adjusted so as to attain permanent residence in the United States. Section 244(a) cannot be construed to take that power away from Congress and lodge it in the Attorney General or in the Federal courts.

By invalidating Section 244(c)(2), the Ninth Circuit makes the rest of Section 244 unworkable insofar as granting permanent status adjustment is concerned. Section 244(c)(2) is simply not severable in this respect. It is the essential core of procedure for legislative exercise of this great sovereign power. Take out Section 244(c)(2), and Chadha is left with a temporary suspension of deportation, a suspension that can never become final without congressional action. Statutorily and realistically, Chadha retains his deportable status.

Thus, in awarding Chadha the permanent status adjustment he could not get from Congress, the Ninth Circuit is forced to rewrite Section 244. And the court, in purported exercise of its remedial powers, performs the extraordinarily sovereign and political act of ordering the

cancellation of Chadha's deportation and directing that he be allowed to reside permanently in the United States, with immediate naturalization eligibility. As we have seen, this is legislative action. It is totally beyond the Article III ken of the Judiciary.

So, when the court proclaims that it can redress Chadha's claimed injuries so as to satisfy the third prong of the standing doctrine, the court does so only by force of a judicial fiat that is constitutionally unwarranted. The absurd result is thereby reached of awarding improper relief to an individual who has no standing to litigate, who has suffered no cognizable injury at the hands of any other party to the case, and who is a total stranger to the separation of powers controversy that he raises.

Chadha brings to this case nothing but the psychological disappointment generated by the negative nature of H. Res. 926. That disappointment does not qualify as a "personal stake" in the requirement of the Article III law of standing that the party seeking relief must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). That the Ninth Circuit did improperly award relief to Chadha only exacerbates Chadha's lack of a "personal stake" in the outcome of an inter-Branch controversy. Chadha is thus unable to contribute anything to the sharpening of that constitutional debate other than the constitutional law essays contained in his brief.

The loose standing requirements reflected in the Ninth Circuit's opinion in *Chadha* have been followed and applied in subsequent litigation in which the legislative review device has been challenged. Thus in the *Consumer Energy Council* case, 673 F.2d 425, the District of Columbia Circuit entertained and resolved a challenge to a one-House disapproval of a proposed Energy Commission rule. That challenge was brought by consumer organizations

on the bare allegation that, had the rule been allowed to become effective, consumers would have benefited from lower natural gas prices.[11] In similar vein, the District of Columbia Circuit, in *Consumers Union of United States* v. *Federal Trade Commission* (D.C. Cir. No. 82-1737, Oct. 22, 1982), resolved a challenge to a two-House disapproval of a proposed FTC Used Car Rule at the instance of consumer organizations, many of whose members might be expected to purchase used cars in the future. The standing requirement was considered satisfied because, had the FTC Used Car Rule been allowed to become law, such potential purchasers would then benefit from the disclosures required by the rule.

The *Chadha* opinion below has indeed spawned a revolution in the Article III law of standing. Under the *Chadha* dispensation, any individual or organization disenchanted or disappointed by the failure of Congress to enact legislation that would be of benefit to that individual or organization has Article III standing to challenge the procedures by which Congress said "no." That is a most frightening prospect.

Allowing standing to those disappointed by the refusal of Congress to confer some benefit upon them was never within the contemplation of the article III "case or controversy" concept. This Court long ago said that it "never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U.S. 339, 345 (1892). The time has come to repeat that sentiment.

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[11] This standing problem is one of the Questions Presented (No. 4) by the House in its pending petition for writ of certiorari in No. 82-209, *United States House of Representatives,* Petitioner v. *Consumer Energy Council of America, et al.,* Respondents.

The House also intends to pursue this standing problem when the *Federal Trade Commission* ruling of the District of Columbia Circuit reaches this Court for review.

B. THE ABSENCE OF ADVERSE PARTIES

Since the day in March of 1977 when Chadha filed in the Ninth Circuit a petition to review his final deportation order, this has been an ill-starred "case or controversy." A prime defect has been the absence of any adverseness between parties on the sole question raised in the petition to review, the constitutionality of Section 244(c)(2). The only two parties to the proceeding, Chadha and the INS, have been as one in protesting the validity of that section, as well as H. Res. 926. See House brief in chief, pp. 46–47; House reply brief, pp. 12–13; House motion to dismiss INS appeal (No. 80–1832), pp. 12–14.

This lack of adverseness between Chadha and the INS has several manifestations:

(1) Chadha has no real controversy with the INS. Both Chadha and the INS agree he is deportable. Both agree that the final deportation order is in proper order and executable. Both agree, however, that the order should be set aside because of the alleged invalidity of Section 244(c)(2). Both agree, and for the same reasons, that Section 244(c)(2) is unconstitutional, and both request a declaration to that effect. Thus the area of agreement between Chadha and the INS covers all claims, all issues and all requests for relief in this proceeding.

This is a classic instance of a stillborn "case or controversy," there being no adverseness at the start of the proceeding in the Ninth Circuit. This court's decision in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), draws the proper conclusion: "There is, therefore, no case or controversy within the meaning or Art. III of the Constitution."

Without explaining away the *Moore* precedent, the Ninth Circuit opines that any contention that there is no adverseness between Chadha and the INS "misconceives the adverseness requirements." 643 F.2d at 419. Then having defined adverseness as a real and substantial controversy admitting of specific relief, the court constructs an adverseness said to be present here:

> Here, Chadha has asserted a concrete controversy, and our decision will have real meaning: is we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him.

This is the same "bootstrap" reasoning used by the court to confer Article III standing on Chadha. It confuses party adverseness as to issues with consequences of judicial resolution of issues. We have already seen that a declaration of invalidity of Section 244(c)(2) does not necessarily carry with it the consequence that Chadha "will not be deported." It does carry that consequence only if the court misconstrues the remainder of Section 244 and engages in an exercise of judicial legislation. The lack of party adverseness is not cured by innovative or unwarranted judicial remedies.

The court adds the *in terrorem* comment that acceptance of the non-adverseness argument would mean "that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional" and that where, as here, "the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds." 634 F.2d at 420. Suffice it to repeat that the deportation order is enforceable here on grounds quite unrelated to the validity or invalidity of Section 244(c)(2). A Section 244 application seeks a waiver, an "act of grace," of the alien's obligation to comply with a lawful order of deportation. If the requested waiver is denied, the INS intention to enforce the order is no greater or less than if no waiver had been sought.

(2) The lack of adverseness is also seen in the nature of the constitutional challenge made by Chadha. He rests his attack on Section 244(c)(2) solely on a general separation of powers proposition that implicates the respective powers of the three coordinate branches of the federal government. He does not claim any personal involvement in that doctrine or in the claim that Congress has sought

to exercise any function expressly vested in the Executive or the Judiciary. *Cf. Buckley* v. *Valeo,* 424 U.S. 1 (1976) (appointment power of the President). And he stakes his all on the side of the Executive in the long-standing inter-Branch debate over the validity of the legislative review device. He has truly volunteered to present the Executive's position on the matter. All of which accounts for the alacrity with which the INS, as representative of the Executive Branch, joins Chadha's constitutional challenge. As happened in *Smith* v. *Indiana,* 191 U.S. 138, 148 (1903), "the celerity of the proceedings and the admissions of counsel indicate that the suit was begun and carried on for the purpose of testing the constitutionality of the law, and that the litigation was at least not an unfriendly one."

(3) It follows that if the INS were realigned according to its position on the constitutional issue, the INS would be a co-plaintiff with Chadha. That would leave the suit below as one between two plaintiffs and no defendants, which is further proof of non-adverseness. The lack of any real adverse party was again made evident when the Ninth Circuit invalidated Section 244(c)(2), as both Chadha and the INS had urged. That decision made both Chadha and the INS prevailing and non-aggrieved parties, a position they retain to this day before this Court. Both parties seek full affirmance of the decision below.

(4) At no time has Chadha's action been focused on the enforcement of any legal obligation or right with respect to the deportation order or the procedures of Section 244(c)(2). He has none to assert. *Cf. Pope* v. *United States,* 323 U.S. 1, 11 (1944). He appears to have brought the action either to assert a generalized "good government" interest in that review device, *see United States* v. *Richardson,* 418 U.S. 166 (1974), or to accommodate the Executive Branch. It now is evident, after more than six years of litigation on the validity of this device, that the Executive Branch cannot discover an appropriate avenue for bringing its own lawsuit against the Legislative Branch

to obtain a judicial declaration of invalidity.[12] It thus is forced to "ride piggyback," *Clark* v. *Valeo,* 559 F.2d 642, 664 (en banc) (D.C.Cir. 1977) (Leventhal, J., concurring), on such opportune suits as Chadha's.

(5) The missing party in interest in the proceeding below was the Congress of the United States. It was also the indispensable party, for it was its legislative rights that were at stake. The Attorney General having abandoned defense of Section 244(c)(2) and gone on the offense, Congress was forced to fend for itself in defending that statutory provision, a rather awkward role for a legislative body to play.

The difficulty here is that neither House was made a party to Chadha's review proceeding; and neither House intervened as parties before the court below.[13] Rather, they were invited to brief and argue as *amici.* This led to the strange doctrine announced by the Ninth Circuit that since "Chadha has asserted a concrete controversy" it suffices that a real party to that constitutional controversy appears in an *amicus* role with "argument for the constitutionality of the statute ably advanced by amici." 634 F.2d at 419–420.

There has never been a case of this dimension so conceived and pursued in non-adverseness. *Amici* simply cannot fulfill the position of litigants asserting legal rights "in actual controversies." *Liverpool Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39 (1885). Article III requires that a controversy *at the beginning of liti-*

[12] It is questionable whether government officials have standing to challenge the constitutionality of statutes they are sworn to execute and defend. See *Marshall* v. *Dye,* 231 U.S. 250, 257–258 (1913); *Columbus & Greenville Ry.* v. *Miller,* 283 U.S. 96, 99–100 (1931), where state officials were held to have no standing to invoke this Court's jurisdiction to resolve the assaults of the officials on state statutes, assaults made in their official rather than personal capacities.

[13] The fact that the House and Senate intervened in the Ninth Circuit *after* judgment, in order to have standing to petition this Court for review, could not retroactively invest the prior proceedings with the necessary adverseness.

gation be a controversy between named parties, a controversy that is "definite and concrete, touching the legal relationships of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). In the words of the commentators 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3530, at 164, 166-167 (1975),

> All models of cases and controversies assume the presence of at least two genuinely adversary parties. . . . The principle remains today that if both parties affirmatively desire the same result, no justiciable case is presented [citing the *Moore* decision]. Cases conceived in cooperation, however, may be saved by intervention of a genuine adversary to represent the rights that might otherwise be affected inadvisedly.

But the instant case does not meet such justiciable models. It involves nothing more than two parties, not in genuine controversy with each other, who join forces and share a desire to affect and prejudice the legal interests of nonparties. By any other name, the decision below is a pure advisory opinion.

(6) Underlying all these non-adverse party factors is the negative nature of operation of the statute under attack by Chadha and the INS. As epitomized by H. Res. 926, Section 244(c)(2) has not operated to affect any legal rights of Chadha and has not generated any genuine controversy between Chadha and the INS. Both parties are foreign to the operation and impact of Section 244(c)(2). One cannot construct a viable "case or controversy" out of such an abstract and non-adversary constitutional issue.

(7) Finally, the so-called *Chadha* model of nonadversariness is inevitably leading to a marked change in "case or controversy" jurisprudence, at least in the area of litigation respecting the legislative review device. In reliance on the loose *Chadha* model, the Executive Branch is becoming bolder in its efforts to secure declarations of invalidity outside the normal Article III requirements of standing and adverse parties. Witness the following:

Case	Position of actual parties to case	Position of real parties to inter-Branch controversy
Chadha v. *INS*, 634 F.2d 408 (9th Cir. 1980)..	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch represented by INS.
	2. INS, an Executive Branch agency, joins in plaintiff's inter-Branch claim.	2. Legislative Branch appears through House and Senate, as *amici*.
Consumer Energy Council v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch, *sub nom.* United States, appears as *amicus* in support of the plaintiffs.
	2. FERC, an independent agency, takes no position on inter-Branch controversy.	2. Legislative Branch appears through House and Senate, as *amici*.
Consumers Union v. *FTC, et al.* (D.C. Cir. No. 82-1737, Oct. 22, 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch appears as nominal party defendant, *sub nom.* FTC.
	2. Executive Branch takes over representation of FTC, an independent agency, and joins in plaintiffs' inter-Branch claim.	2. Senate and House named as parties defendant; this raises unresolved problem of capacity of Congress to be sued without express consent.
	3. Senate and House named as parties defendant and support constitutionality of legislative review device.	
Pacific Legal Foundation v. *Watt*, 529 F. Supp. 982 (D. Mont. 1981); 539 F. Supp. 1194 (D. Mont. 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch appears through defendant executive officers.
	2. Executive Branch, representing executive officers, agrees with plaintiffs' constitutional claim.	2. Legislative Branch appears through Senate and House committees, as *amici*.
American Foreign Service Assn. v. *McPherson* (D.C.D.C. Civil Action No. 81-2073).	1. Private plaintiff challenges validity of A.I.D. regulation that was made effective without being submitted to Congress for approval.	1. Executive Branch appears through defendant executive officer.

Case	Position of actual parties to case	Position of real parties to inter-Branch controversy
	2. Executive Branch, representing A.I.D. Administrator, defends regulation on ground that "Congressional review of the proposed [regulation] changes was neither necessary nor constitutional," relying on *Chadha* decision. See defendant's memorandum in support of motion to dismiss, p. 16, fn.	2. Legislative Branch does not appear in any capacity.
Williams v. *Pierce* (S.D.N.Y. Civil Action No. 82 Civ. 5224).	1. Private plaintiffs challenge validity and effectiveness of a HUD "interim final rule" that HUD put into effect despite an adverse deferral resolution adopted by a House committee, pursuant to statute.	1. Executive Branch appears through executive defendant officer.
	2. Executive Branch, representing executive officers, defends the effectiveness of the "interim final rule" on the basis of advice from the Department of Justice that "both before and after passage of § 7(o)(3) * * * the 90-day deferral mechanism in that statute is unconstitutional," citing the *Chadha* ruling. See federal defendants' memorandum in opposition to plaintiffs' motion for preliminary injunction, pp. 9–10.	2. Legislative Branch does not appear in any capacity.

What we are seeing is a virtual breakdown in the use of the genuine adversarial system for adjudicating inter-Branch separation of powers problems. Particularly disturbing is the recent tendency of the Executive Branch to ignore statutory requirements for submission of executive regulations to Congress for final approval or disapproval. *Cf.* Article II, Section 3: the President "shall take Care that the Laws be faithfully executed."

The *Chadha* ruling is indeed bearing bitter fruit.

CONCLUSION

For all these reasons, supplementing those previously presented in the briefs and motions of the House and Senate, the judgment of the Ninth Circuit should be reversed and/or vacated. The threshold justiciability problems in this case are of such magnitude as to warrant dismissing Chadha's petition for review of the deportation order, without reaching the inter-Branch separation of powers dispute. But if that dispute be reached, the House of Representatives requests that the judgment below be reversed on the ground that Section 244(c)(2) is a proper exercise of congressional power to delegate and/or retain quasi-legislative functions pursuant to a duly enacted plenary statute.

Respectfully submitted.

EUGENE GRESSMAN,
Special Counsel,
U.S. House of Representatives
Visiting Professor, Fordham University
School of Law, 140 West 62d Street,
New York, N.Y. 10023.
(212) 841-5242

Of counsel:

STANLEY M. BRAND,
General Counsel to the Clerk,
U.S. House of Representatives,
Washington, D.C. 20515.
(202) 225-7000

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